HARVARD

LAW REVIEW.

VOL. IV. MAY 15, 1890. NO. 2.

# THE BURDEN OF PROOF.

IF we conceive to ourselves a legal system in which the pleadings, if any there be, admit of only one defence, that of mere negation, — that is to say, where not merely the pleading is negative in form, but where no other than a purely negative defence is open under it, and all other defences, as if they were cross actions, require a separate trial; we can see that the phrase Burden of Proof (*Onus probandi, Beweislast, Fardeau de la preuve*) may have a very simple meaning. Under such a system the defendant has nothing to prove; it is the plaintiff, the *actor*, who has the duty of proving, while the defendant, the *reus*, has only the negative function of baffling the plaintiff.

If, on the other hand, we picture a system in which any defence whatever may be open upon a plea of general denial, in which a defendant who stands upon the record as merely denying, may, at the trial, turn himself into a plaintiff by setting up an affirmative defence, and the original plaintiff may become a defendant by merely denying this new case of his adversary; then we observe that so simple a conception of the proof and the duty of proving, is no longer possible. Either party may have it, and it may shift back and forth during the trial, because each party in turn may set up, in the course of the trial, an affirmative ground of fact, which, if he would win, he must, of course, make good by proof. We can no longer say when the pleading is over and

before the trial begins, "the proof belongs here and cannot belong elsewhere; the *onus probandi* is on the plaintiff and it cannot shift."

If now we further conceive that under this last system the action of the tribunal passing upon questions of fact is subject to review, so that an appellate court may have to consider whether such a body as a jury has acted reasonably in weighing evidence and counter-evidence, and whether the judge who has presided over a trial by jury has rightly ordered the trial, and rightly instructed the jury as to comparing and weighing evidence, we may see that questions will be introduced into legal discussion as to the respective duties of the parties in producing evidence at different points of the trial, and in meeting evidence produced against them, which may be wholly absent from another system where there is no such judicial revision of the method of using and estimating the evidence. The conception is brought to light of producing evidence to meet the pressure of an adversary's case, a duty which may belong to either party, and to both parties in turn; and this conception now takes its place in legal discussion and requires its own terminology.

Let us further suppose that this new topic,— new in the sense of requiring now to be discriminated and discussed,— the mere duty of producing evidence, belonging thus to neither party exclusively, and to each by turns, gets also called the burden of proof; it becomes plain that, as regards the meaning of this term, we have advanced from a region of simple and clear ideas to one which is likely to be full of confusion. We have, in fact, proceeded from conceptions which we may roughly describe as those of the Roman law and of some later systems founded upon it, to those which fill and perplex the books of our common law to-day.

If now, furthermore, recognizing that there are these two wholly distinct notions of the burden of proof, both called by the same name, we then observe that, as regards one of them, the duty of establishing, it is often a very difficult thing to determine whether a given defence be an affirmative one or not, and so to decide which party has the burden of the proof in this sense, and that the common-law judges have fallen into the way of giving as the test,[1] as the regular professional "rule of thumb," for tell-

[1] "The proper test is, which party would be successful if no evidence at all were given." Alderson, B., in Amos *v.* Hughes, 1 Moo. & Rob. 464.

ing who has this burden of proof, a precept which selects a circumstance common to both meanings of the term, and, indeed, generally characteristic of the other one, namely, the duty of going forward with evidence,— we shall see how the confusion is likely to be heightened.

Finally, if we go on to remark the way in which this topic is mixed up with that of presumptions, as when it is said that "presumptions of law and strong presumptions of fact shift the burden of proof," we have a glimpse of another fruitful source of confusion; and in fact these two subjects of presumption and the burden of proof have intercommunicated their respective ambiguities and reflected them back and forth upon each other in a manner which it is wellnigh hopeless to follow out.[1]

If all this or the half of it be true, it will be admitted that he would do a great service to our law who should thoroughly discriminate, explore, and set forth the legal doctrine of the burden of proof. But that would be a large undertaking. The fit performance of it would require a deep historical and critical examination of pleading and procedure, a careful consideration of legal presumptions and the principles of legal reasoning, and a just analysis of the fundamental conceptions of substantive law.[2] Such a discussion would have to take a wide range, for the subject belongs to universal jurisprudence, and the phrase and the things it stands for have a long descent. The leading maxims about it (often ill understood) are from the Roman law. During the Dark Ages and among our Germanic ancestors it had a very peculiar application. Conceptions coming from these periods still linger in our law, as will easily seem probable when we reflect that not only do our early judicial records show the ordeal and other mediæval modes of proof in full operation, but that wager of law and wager of battle were legally resorted to in England in the second and third decades of this century.[3] With

[1] "Look to the books," says Bentham, in speaking of the burden of proof (Works, vi. 139), "and... instead of clear rules, such as the nature of things forbids to be established by anything but statute law, you have darkness palpable and visible."

[2] It may be assumed, I suppose, that this phrase of the "substantive law," and Bentham's discrimination between this part of the law and that which is merely auxiliary to it, are already familiar. See *e. g.*, Bentham's Works, vi. 7. "The adjective branch of law, or law of procedure, and therein the law of evidence, has everywhere for its object, at least ought to have, the giving effect... to the several regulations and arrangements of which the substantive branch or main body of the law is composed."

[3] For the mediæval conception of the burden, or, as it generally was in those times,

the use of the jury came a new set of ideas and a new system of pleading, very different from those of Rome and modern continental Europe; and gradually, with the slow and strange development of the jury system, and the irregular working out of common-law pleading, there has arisen and come into prominence a new set of discriminations. Much that never, in other times and countries, was the subject of legal discussion, and never passed out from the mass of the unrecorded details of forensic usage, now, through the working of our double tribunal of judge and jury, and the constant necessity which it brings of marking their respective boundaries, and reviewing in a higher court the instructions given by the judge to the jury, comes into the region of law and judicial precedent. Of all these things will the writer of that careful statement of which I speak find it necessary to treat. It is probable that he will have abundant occasion to remark in this region that obscure operation of obsolete conceptions to which Sir Henry Maine referred in saying, "It may almost be laid down that in England nothing wholly perishes."[1]

At present I am concerned with no such task as this, but only with an attempt to help rid this phrase, the burden of proof, of some of the distressing ambiguity that attends it, (*a*) by pointing out the different conceptions for which it stands, and bringing to view some important discriminations; (*b*) by considering the possibility of a better terminology for the subject; and (*c*) by indicating its proper place in our law.

I. In legal discussion this phrase is used in two ways: —

(1.) To indicate the duty of bringing forward argument or evidence in support of a proposition, whether at the beginning or later.

(2.) To mark that of establishing a proposition as against all counter-argument or evidence.

It should be added that there is a third indiscriminate usage,

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the *privilege* of proof, see Von Bar's "Beweisurtheil" and Brunner's "Entstehung der Schwurgerichte," *passim*. See also Professor Laughlin's paper on "Legal Procedure" in "Essays on Anglo-Saxon Law," and Bigelow's "Hist. Proc. in England," ch. viii. In citing German books I should confess at once that I have to depend upon my friends for a knowledge of them, and should express my thanks to Mr. Gamaliel Bradford for the most generous kindness in reading to me not only the whole of the two books above named, but others. I am also very much indebted to the accurate learning of a younger friend, Mr. Fletcher Ladd, of the Boston bar, for a knowledge of the contents of several German treatises relating more exclusively to the subject of this article.

[1] Early Law and Custom, 187.

far more common than either of the others, in which the term may mean both or either of the first two. The last is very common; the first or second, that is to say, any meaning which makes a clear discrimination, is much less usual.

II. It will be convenient at this point to illustrate the different uses of the term by some citations.

(1.) The use of it in ordinary, untechnical speech, as indicating the effect of a natural probability or presumption, of the pressure of evidence or argument previously introduced, and of what is called a mere "preoccupation of the ground," may be seen in a passage from Bishop Whately's "Elements of Rhetoric:"[1] "It is a point of great importance . . . to point out . . . on which side the presumption lies, and to which belongs the (*onus probandi*) burden of proof. . . . According to the most correct use of the term, a 'presumption' in favor of any supposition means . . . in short that the burden of proof lies on the side of him who would dispute it."

Of the same use of it in our law books, the following are instances: (*a.*) "The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a *prima facie* case against a party." (Best, Evidence, s. 273.) And again: "As . . . the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus, viz.: 'Which party would be successful if no evidence at all, or no more evidence, as the case may be, were given.'" (*b.*) A very clear expression of this sense of the term is found in Lord Justice Bowen's opinion in Abrath *v.* No. East. Ry. Co.[2] "In order to make my opinion clear, I should like to say shortly how I understand the term 'burden of proof.' In every lawsuit somebody must go on with it; the plaintiff is the first to begin, and if he does nothing he fails. If he makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails. The test, therefore, as to burden of proof is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular

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[1] Part I. c. 3, s. 2.

[2] 32 W. R. 50, 53. In the regular report (11 Q. B. D. 440, 455–6) the phraseology is slightly, but not materially, different.

point of the case, because it is obvious that during the controversy in the litigation there are points at which the onus of proof shifts, and at which the tribunal must say, if the case stopped there, that it must be decided in a particular way. Such being the test, it is not a burden which rests forever on the person on whom it is first cast, but as soon as he, in his turn, finds evidence which, *prima facie*, rebuts the evidence against which he is contending, the burden shifts until again there is evidence which satisfies the demand. Now, that being so, the question as to onus of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win." (*c.*) From Mr. Justice Stephen's Digest of Evidence [1] we may gather that he understands this to be the established usage in England. And the like is laid down for Scotland.[2]

(2.) As to the second sense of the term, expressing the duty of the *actor* to establish the grounds upon which he rests his demand that the court shall move in his behalf,— that is the sense to which, since the year 1832,[3] the Supreme Court of Massachusetts has sought to limit the expression. (*a.*) In 1854[4] it was put thus: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established. In the case at bar, the averment which the plaintiff was bound to maintain was that the defendant was legally liable for the payment of tolls. In answer to this the defendant did not aver any new and distinct fact, such as payment, accord and satisfaction, or release; but offered evidence to rebut this alleged legal liability. By so doing he did not assume the burden of proof, which still rested on the plaintiff; but only sought to rebut the *prima facie* case which the plaintiff had proved." (*b.*) In the following passage may be seen an instance of what is not uncommon now-a-days, a recognition of this as one sense of the term, and also of the other. In 1878,[5] Lord Justice

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[1] Articles 95 and 96 and the illustrations.

[2] Dickson, Evidence in Scotland (2 ed.), ss. 12–16.

[3] Powers *v.* Russell, 13 Pick. 69.

[4] Central Bridge Co. *v.* Butler, 2 Gray, 130.

[5] Pickup *v.* Thames Ins. Co., 3 Q. B. D. p. 600.

Brett remarked, with valuable comments on the case of Watson *v.* Clark (1 Dow, 336), that "The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and so far as the pleadings go it never shifts. . . . But when facts are given in evidence, it is often said that certain presumptions, which are really inferences of fact, arise and cause the burden of proof to shift; and so they do as a matter of reasoning, and as a matter of fact."[1] (*c.*) In New York,[2] Church, C. J., for the court, expresses himself thus: "The burden of maintaining the affirmative of the issue, and properly speaking, the burden of proof remained upon the plaintiff throughout the trial; but the burden or necessity was cast upon the defendant, to relieve itself from the presumption of negligence raised by the plaintiff's evidence."

(3.) A few cases may be added which illustrate the common confusion in the use of the term. (*a.*) A doctrine was formerly laid down in England that in prosecutions under the game laws, the defendant had the burden of establishing that he was qualified. This really rested in part upon the construction of the statutes.[3] But it came to be laid down generally, as we read in Greenleaf to-day,[4] that "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." There is great sense in such a doctrine as indicating a duty of producing evidence, but little or none as marking a general duty of establishing; but by reason of the ambiguity of this phrase, the doctrine is afloat in both senses. That it should be limited, as a statement of the common law, to the sense of a duty of giving evidence, is plainly shown by the remarks of Holroyd, J.: "In every case the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own

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[1] Compare the same judge in Anderson *v.* Morice, L. R. 10 C. P. 58 (1874), Abrath *v.* No. East. Ry. Co., 11 Q. B. D. 440 (1883), and Davey *v.* Lond. & S. W. Ry. Co., 12 Q. B. D. 70.

[2] Caldwell *v.* New Jersey Co., 47 N. Y. 282, 290.

[3] The King *v.* Turner, 5 M. & S. 206, 210 (1816): "There are, I think, about ten different heads of qualification enumerated in the statutes. . . . The argument really comes to this: that there would be a moral impossibility of ever convicting upon such an information." *Per* Lord Ellenborough. See King *v.* Stone, 1 East, 639 (1801), where the court was divided.

[4] Ev. i. s. 79.

knowledge. . . . This indeed is not allowed to supply the want of necessary proof," etc.[1] (*b.*) A striking instance, at once of the common English sense of the term, and of the perplexing way in which this is mixed up with the other sense of it, is found in a recent opinion of so great a judge as Lord Blackburn. In an Irish negligence case[2] a very interesting discussion arose as to the relation between the court and the jury, and the circumstances under which a judge can direct a verdict; incidentally it touched the burden of proof. Lord Blackburn, who held, in this case, that a verdict should be entered for the defendants, put his view thus: To justify this, "it is not enough that the balance of testimony should be overwhelmingly on one side," so that a verdict the other way ought to be set aside, but "the onus must be one way, and no reasonable evidence to rebut it." By "onus" and "onus of proof," Lord Blackburn does not mean the duty of ultimately establishing a proposition; but his use of the term is so connected with that meaning, and with the doctrine that the general issue does not necessarily mean a negative case, that it will be instructive to quote his words: "It is of great importance to see on whom the onus of proof lies, for if the state of the case is such that on the admissions on the record, and the undisputed facts given in evidence on the trial, the onus lies on either side, the judge ought to give the direction, first, that if there are no additional facts to alter this, the jury ought to find

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[1] King *v.* Burdett, 4 B. & Ald. p. 140 (1820). See also Steph. Dig. Ev. art. 96: "In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively." Compare Best, Ev. ss. 275, 276. Bonnier, Traité des Preuves (4 ed.), i. 33: "La difficulté de la preuve . . . n'est point un motif suffisant pour intervertir les rôles." And again, 49: "C'est toujours au demandeur à prouver, et qu'il peut le faire, même lorsqu'il s'agit d'un fait negatif; il le pourra bien plus facilement si on admet cette sage restriction que, pour rendre la négative définie, il est permis d'obliger la partie adverse à préciser ses prétentions." The sound common-law doctrine, together with a reference to statutes that change it, is found in Wilson *v.* Melvin, 13 Gray, 73, and Com. *v.* Lahy, 8 Gray, 459. The question arising under the English Game Laws was afterwards regulated by statute. (1 Tayl. Ev., 8 ed., s. 377, note). Such statutes, exempting a party from the duty of giving evidence in certain cases, or imposing the "burden of proof" on the other, are common enough both here and in England. They might easily give rise to questions of construction as to the meaning of the phrase now under discussion. In dealing with one of these statutes (which had not, however, used the very phrase), it was said by the court in Mugler *v.* Kansas, 123 U. S. p. 674, that it simply determined what was a *prima facie* case for the government.

[2] Dublin, etc. Ry. Co. *v.* Slattery, 3 App. Cas. 1155.

against that party on whom the onus now lies" (p. 1201). "I think the recent decision of your Lordship's House in Metropolitan Railway Company *v.* Jackson conclusively establishes this doctrine in cases in which the onus was, on the issue, as joined on the record, on the party against whom the verdict was directed. I am of opinion that it is equally so when a fact found, or undisputed at the trial, has shifted that onus" (p. 1202). "The cases in which the principle that the onus may shift from time to time has been most frequently applied, are those of bills of exchange. At the beginning of a trial under the old system of pleading . . . the onus was on the plaintiff to prove that he was holder, and that the defendant signed the bill. If he proved that, the onus was on the defendant; for the bill imports consideration. If the defendant proved that the bill was stolen, or that there was fraud, the onus was shifted, and the plaintiff had to prove that he gave value for it. This . . . depends not on the allegation, under the new system, on the record, that there was fraud, but on the proof of it at the trial" (p. 1203). "It was laid down in Ryder *v.* Wombwell that 'there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies; if there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant,' and this was approved of and adopted in this House in the recent case of Metropolitan Railway Company *v.* Jackson. I have already given my reasons for thinking that the expression, 'the party on whom the onus of proof lies,' must mean, not the party on whom it lay at the beginning of the trial, but the party on whom, on the undisputed facts, it lay at the time the direction was given" (p. 1208). (*c.*) Baron Parke's statement in Barry *v.* Butlin [1] is well known: "The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him." This might seem to point to the duty of establishing. Does it? It describes only the duty of one, whoever he may be, having the *onus probandi*, whatever that may be, to produce evidence. Now, the common English conception is

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[1] 2 Moore, P. C. 484; s. c. 1 Curteis, p. 640; and so Metcalf, J., in 6 Cush. p. 319.

that when he does have this and makes a prima facie case, the other party, and not he, is the one who then has the *onus probandi;* so that then Baron Parke's remark will apply to him.[1] Baron Parke's expression appears to be consistent with either view, since the duty of beginning and that of finally establishing, *may* rest upon different persons.[2] (*d.*) A recent case in the Supreme Court of Connecticut[3] is a striking illustration of the perplexity that attends many attempts to deal with this subject in criminal cases. The defendant was prosecuted under a statute, for neglecting and refusing to support his wife. At the trial, under the usual plea of not guilty, he set up her adultery. The jury were charged that the defendant had the burden of proof to sustain the adultery beyond a reasonable doubt. A verdict for the State was set aside, and a new trial granted for misdirection. It was laid down by the court (Andrews, C. J.) that the burden of proof is on the government to prove its case in all its parts; that the issue is but one, the defendant's guilt, and that whenever a defence is so proved that a reasonable doubt is caused as to any part of the case, the jury should acquit. But in setting this forth, the court at the same time says: "If the defendant relies upon some distinct substantive ground of defence not necessarily connected with the transaction, . . . as insanity or self-defence, or an *alibi*, or, as in the case at bar, the adultery of the wife, he must prove it as an independent fact. . . . It is incumbent upon the defendant to establish the fact. . . . All authorities agree that the burden is upon the State to make out its accusation . . . beyond all reasonable doubt. . . . When a defendant desires to set up a distinct defence, . . . he must bring it to the attention of the court; in other words, he must prove it, . . . that is, he must produce more evidence in support of it than there is against it. When he has done this by a preponderance of the evidence, the defence becomes a fact in the case of which the jury must take notice . . . and dispose of it according to the rule before stated, that the burden is upon the State to

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[1] Such is Baron Parke's own use of the term in Elkin *v.* Janson, 13 M. & W. pp. 662–3, and Lord Halsbury's and Lord Watson's in Wakelin *v.* London, etc. Ry. Co., 12 App. Cas. 41; where also Lord Blackburn, having read Lord Watson's opinion, remarks: "In it I perfectly agree." See also Stephen, Dig. Ev. arts. 95 and 96, and L. J. Bowen, *ante*, p. 49.

[2] See *infra*, p. 66.

[3] State *v.* Schweitzer, 57 Conn. 532 (1889).

prove every part of the case against the prisoner beyond a reasonable doubt."[1] The court here avoid saying in terms that the defendant has any "burden of proof," but they say it in substance. If the defendant must establish the insanity or *alibi* by the preponderance of the evidence, he has the burden of proving it. It would seem that the true theory of this case is that the defence has nothing to "prove,"[2] but has only to do what the court intimated in Com. *v.* Choate (105 Mass. 451), when it said: "The evidence which tended to prove the *alibi*, even if it failed to establish it, was left to have its full effect in bringing into doubt the evidence tending to prove the defendant's presence at the fire." So here, defendant need not establish the adultery; he need only bring the jury to a reasonable doubt about it; for, according to the theory of the case, *that* is a reasonable doubt of the defendant's guilt.[3]

III. The subject is, of course, very intimately connected with that of pleading.

(1.) It is important to notice further one or two peculiarities of the Roman law, already alluded to; for that body of law has given us the term *onus probandi* and a variety of often-quoted maxims about it. Under the system which prevailed in classical times, and for two or three centuries after the Christian Era, — a period which includes the great jurists whose responses are preserved in the Digest, — the Prætor sent to the judex a formula containing a brief indication of the plaintiff's claim, of the affirmative defence, if any, of the affirmative replication, if any, and so on, — with instructions to hear the parties and their witnesses, and then decide the case. No denials were mentioned in the formula, but each affirmative case was understood to be denied. Then followed a trial of each of these cases separately, — first, the plaintiff's; then, unless that failed, the defendant's; and then, unless that failed, the plaintiff's replication; and so on. What, in our

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[1] For this exposition the court cite, among other cases, Brotherton *v.* The People, 75 N. Y. 159, and the charge in Com. *v.* Choate, 105 Mass. 451; and they remark that this last charge was "held to be correct." But surely this is misleading. The Massachusetts court held in effect that the charge was inconsistent and in part bad, but that it contained its own antidote, and therefore the verdict might stand.

[2] "It is a prisoner's burden, the only burden ever put upon him by the law, that of satisfying the jury that there is a reasonable doubt of his guilt." R. H. Dana, *arguendo*, York's Case, 9 Met. p. 98.

[3] See the clear statements in State *v.* Crawford, 11 Kans. p. 44-5 (1873), and in Scott *v.* Wood, 81 Cal. 398 (1889).

system, is a plea in confession and avoidance, was, in the Roman system, merely a supposition of the truth of the opposite case, an anticipation of a possible proof of it, and an avoidance of it; nothing was really admitted. As illustrating this, I quote in a note from Professor Langdell's clear account of a procedure which is thought to have "differed but slightly in principle" from that of the period to which I now refer.[1]

Now, under such a method, where every case presents, at the trial, a clear and unchangeable affirmation and denial, the phrase *onus probandi* (and so the leading Latin maxims about it) may have a very simple meaning. The proof, the burden of proving, belongs to the *actor;* it cannot shift, and cannot belong to the *reus,* whose function is not that of proving, but the purely negative one of repelling or making ineffective the adversary's attempts to prove.[2]

(2.) It would be possible to conduct legal controversies, as well as others, without any written or recorded pleadings, or in disregard of them. It has often been done. The convenient practice of trying cases upon agreed facts, whether resting on a statute[3] or on the practice of the courts, will readily come to mind. As regards everything following the declaration in civil cases and the indictment in criminal cases, we are familiar in modern times with that state of things, — indeed the common law has always known it.[4] An oral plea of not guilty and a written general

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[1] Equity Pleading (2 ed.), ss. 4–14. "There were . . . as many stages in the trial as there were pleadings. The first stage consisted of the trial of the plaintiff's case as stated in the libel. For this purpose the plaintiff would first put in his evidence in support of his case, and the defendant would then put in his evidence, if he had any, in contradiction. The evidence bearing upon the libel being exhausted, the next stage was the trial of the exception, which proceeded in the same manner as the trial of the libel, except that the defendant began, he having the burden of proof as to his exception. In this manner the trial proceeded, until all the evidence bearing upon each of the pleas in succession was exhausted, each party being required in turn to prove his own pleading, if he would avail himself of it (s. 8). . . . Finally it will be found that all the essential differences between a trial at common law and by the civil law, arise from this, namely, that by the common law a cause goes to trial with everything alleged in the pleadings on either side admitted, except the single point upon which issue is joined, while by the civil law it goes to trial with nothing admitted" (s. 12). This system has largely survived on the continent of Europe, in Scotland, and in our equity procedure.

[2] This is equally plain in any simple case under our system, such as Hingeston *v.* Kelly, 18 L. J. N. S. Ex. 360 (a neat case), and Phipps *v.* Mahon, 141 Mass. 471, a like instance, where the thing is well expounded.

[3] *E.g.*, St. 15 & 16 Vic. c. 76, s. 46.

[4] Co. Lit. 283.

denial are very common answers, whatever may be the real nature of the defence. It may be remembered that within a few years it was formally recommended by a committee of the leading judicial and legal personages in England, appointed by the Lord Chancellor, that litigation should thereafter be conducted in the High Court of Justice without any pleadings. "The committee is of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings." The recommendation followed of a rule that "No pleadings shall be allowed unless by order of a judge."[1] The substitute for pleadings which these propositions contemplated was a brief endorsement upon a writ of summons, indicating the nature of the plaintiff's claim, and a brief notice from the defendant of any special defence, such as the Statute of Limitations or payment. Although these suggestions were not in form adopted, yet English common-law pleading has come down to a very simple basis indeed; and so generally in this country.

But whether there be pleadings or not, and whether they be simple or not, you come down, at some stage of the controversy, just as they did at Rome, upon a proposition, or more than one, on which the parties are at issue, one party asserting and the other denying. It may be that this issue is not stated in the pleadings and that it is left to come out at the trial, in the giving of evidence. An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so it is because the party making the admission sets up something that avoids the apparent effect of his adversary's facts; as subsequent payment avoids the effect of facts which show a claim in contract. When this happens the party defending becomes, in so far, the *actor* or plaintiff. In general, he who seeks to move a court to take action in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in setting up an affirmative defence, has the rôle of *actor* (*reus excipiendo fit actor*), — must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law.[2] But he, in every case, who is the true *reus* or defendant holds a very different place in

[1] This interesting report may be found in the London Times for Oct. 8, 1881. It is signed by Lord Coleridge, Lord Justice James, Justices Hannen and Bowen, the Attorney-General (James), the Solicitor General Herschell, and others.

[2] Bonnier, Preuves, i. 30 (4 ed.): "Celui qui doit innover doit démontrer que sa prétention est fondée."

the procedure. He awaits the action of his adversary; and it is enough if he simply repel him. The *reus* has no duty of satisfying the court; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong and his adversary legally in the right, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome, or, to use the more familiar figure, because the *actor* has not carried his case beyond the point of an equilibrium of proof, or, as the case may be, of all reasonable doubt.[1] Whatever the standard be, it is always the *actor* and never the *reus* who has to carry his proof to the required height; for, truly speaking, it is only the *actor* that has any duty of proving at all. Whoever has the duty does not even make out a prima facie case till he comes up to the requirement, and, of course, he has not, at the end of the debate, accomplished his task unless he has held good his case, and held it at the legal height, as against all counter proof. This duty, in the nature of things, here, as well as at Rome, cannot shift, except as the position of *actor* shifts; it is always the duty of one party and never of the other. But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out a case, and must repel it. And then, again, the *actor* may move and restore his case, and so on. This shifting of the duty of going forward with argument or evidence may go on through the trial. Of course, the thing that thus shifts and changes is not the peculiar duty of each party, — for that remains peculiar, *i.e.*, the duty, on the one hand, of making out and holding good a case which will move the court, and, on the other, the purely negative duty of preventing this; but it is the common and interchangeable duty of going forward with argument or evidence.

(3.) The question of how it shall be determined whether a particular claim or defence be an affirmative one might seem very

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[1] Bracton, fol. 239 *b*; Bonnier, Preuves, i. 51 (4 ed.), remarks: "Nos anciens auteurs, de leur côté, ont proposé divers expédients pour résoudre les questions douteuses. Les uns veulent qu'on tranche le différend par la moitié, ce que Cujas appelle avec raison *anile judicium*. D'autres proposent l'emploi du sort, emploi qui a été réalisé effectivement en 1644 dans la fameuse *sentence des bûchettes*." He adds in a note: "Par un juge de Melle qui avait fait tirer aux plaideurs deux pailles ou *bûchettes*, qu'il tenait entre les doigts. Heureusement pour l'honneur de la justice, elle a été reformée par le parlement de Paris."

simple, but often, in fact, it is not. It is far from being a mere question of the form in which a party phrases his claim or his defence, whether that be affirmative or negative. The general question might be answered on various principles. It might turn on the mere form of the pleadings, and in some instances it does.[1] In civil cases, and, in some jurisdictions, in criminal cases, matters are often in no such simple condition. "Undoubtedly," says Mr. Justice Holmes, "many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture, or, probably, illegality. Where the line should be drawn might differ, conceivably, in different jurisdictions." (Starratt *v.* Mullen, 148 Mass. p. 571.) In general, the considerations of detail which affect this matter are those of precedent and of mere practical convenience, tempered by logic. Whatever they be, it is not my purpose to deal with them; it is, as I have indicated before, too large a matter. If there were space, I should insert here the substance of Professor Langdell's very valuable statement upon this subject;[2] but as there is not, I beg to commend it to the perusal of the reader. Bentham recognized the difficulties attending this subject, and offered as his chief and indispensable remedy "the restoration of that feature of primitive justice, — confrontation of the parties at the outset *coram judice*," and the application of the maxim that he should have the burden "on whom it would sit lightest," *i.e.*, who could fulfil the requirements with the least "vexation, delay, and expense."[3]

(4.) But now, keeping all this in mind, it is very important to remark certain sources of ambiguity.

(*a.*) He who has to move the court and establish his case, has also, as we see, to go forward with the proof of it; the other may rest until then, and will win without a stroke if the first remain idle. This duty is generally given as the distinctive test of an affirmative case, — "Which party would be successful if no evidence at all were given."[4] But when the *actor* has gone forward and made his prima facie case, he has brought a pressure to bear

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[1] See Professor McClain's valuable article on "The Burden of Proof in Criminal Prosecutions," 17 Am. Law Review, 892.

[2] Equity Pleading (2 ed.), ss. 108 *et seq.* See also Pomeroy, Remedies, c. 4.

[3] Bentham, Works, vi. 139, 136. [4] Amos *v.* Hughes, 1 Moo. & Rob. 464.

upon the *reus*, which will compel him to come forward; and he again may bring a pressure to bear upon the *actor* that will call him out. This duty of going forward in response to the pressure of a prima facie case, or of a natural or legal presumption, — a duty belonging to either party, — is, in its nature, the same as that which rests upon the *actor* at the beginning, and which is put as the distinctive test of an *actor;* it is merely a duty of going forward. This fact was perceived, and it led to a use of the test, which imperceptibly draws the mind away from the notion of an affirmative case, to something quite different. "As, however," says Best,[1] "the question of the burden of proof may present itself at any moment during a trial, the test ought, in strict accuracy, to be expressed thus, viz.: Which party would be successful if no evidence at all, or no more evidence, as the case may be, were given?" Now, when this has been said and accepted, all notion of a duty that is limited to the beginning of a case is thrown away, and so every circumstance that discriminates the *actor* and the *reus*. We are told that we may know him who has the burden of proof by considering whether, *at any given moment*, a party would lose if the case stopped then and there. But that is a test that may apply to either party, for it points to a situation in which either may find himself, that of having the duty of going forward. In short, the test for the burden of establishing has become a test which is good only for the burden of producing evidence. This duty now comes prominently forward, and the other is lost sight of. Meantime, this change is unobserved. And, as we have but one term for the two ideas, it gets used now for one and now for the other; and, again, in a way which makes it impossible to say what is the meaning; and so there is no end of confusion.

(*b.*) Another source of ambiguity relates to the "shifting" of the burden of proof. We see that the burden of going forward with evidence shifts from side to side, while the duty of establishing his proposition is always with the *actor*, and never shifts. But as we have only one phrase for the two ideas, we say, alternately, that the burden of proof does and does not shift. And then still another ambiguity. The burden of establishing is sometimes called "the burden of proof upon the record," and it is assumed that the record shows the full allegations of the parties.

[1] Evid. s. 268, and so Bowen, L. J., in Abrath *v.* N. E. Ry. Co., 11 Q. B. D. 440.

But in fact, as we have seen, the record very often indeed fails to do that, and when the general issue is pleaded the denying party is often allowed in his evidence to set up affirmative defences.[1] So far as the record shows us anything in such a case, the plaintiff is the *actor*, and the burden of establishing the proposition of the case appears to be upon him. And yet, since his adversary may offer evidence of an affirmative case, and when he does, becomes the *actor*, and has, with his affirmation, the burden of establishing it, this burden of establishing has shifted, because a new proposition has been introduced. The real fact is, that under this mode of pleading the point of time required for setting up the affirmative case is different from that fixed where the pleading is scientific; instead of requiring that it be disclosed before the pleadings are ended, it is allowed to be made known during the progress of the trial, and the sense in which we say that the burden of proof has shifted is that sense in which, under a strict rule of pleading, it would be said to shift while the pleadings are going forward, being first upon the plaintiff, "shifting" to the defendant when he pleads in confession and avoidance, and remaining fixed at the end where the last purely negative plea leaves it. In both cases the burden of establishing is said to "shift," in the sense that a new affirmative case has been disclosed, which carries with it the duty of making it out. It remains just as true as ever that the burden of establishing a given proposition in issue never shifts, *i.e.*, it is always upon the *actor;* but since new issues may be developed at the trial, we say that the burden of establishing shifts during the trial. Accordingly we find that Chief Justice Shaw, in the very act of starting the peculiar practice which has since existed in Massachusetts of limiting the meaning of the term "burden of proof" to the one meaning of the *actor's* duty of establishing his proposition, lays it down that, "Where the party having the burden of proof gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of

[1] Such is a very common doctrine about the defence of contributory negligence. Ind. R.R. Co. *v.* Horst, 93 U. S. 291; Wakelin *v.* Ry. Co., 12 App. Cas. 41. In Missouri (Stone *v.* Hunt, 94 Mo. 475), as in Ireland (Dublin, etc. Ry. Co. *v.* Slattery, 3 App. Cas. 1155), the defendant must plead contributory negligence specially. See Hubbard *v.* Harden Exp. Co., 10 R. I. p. 254; and compare Hutch. Carriers, § 766–8.

it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." [1]

It is common now, in Massachusetts, to say that "the burden of proof never shifts." [2]

(*c.*) Another source of ambiguity lies in the relation between legal presumptions or rules of presumption, and the burden of proof. What is true of these phrases in one sense may not be true in another. When it is said that the burden of establishing lies upon the *actor*, this refers to the total proposition or series of propositions which constitute his disputed case. As when in an action for malicious prosecution [3] the Master of the Rolls said: "The burden of proof of satisfying a jury that there was a want of reasonable care lies upon the plaintiff, because the proof of that . . . is a necessary part of the larger question, of which the burden of proof lies upon him." Suppose, then, that it be settled in any case, upon the principles, whatever they be, which govern the question, that the burden of establishing a given issue is upon A, and that upon some detail of this issue a rule of presumption makes in favor of A, *e.g.*, that he has to establish a will, and that the presumption of sanity helps him as to this one element of his proposition; [4] or that he has to establish the heirship of a child, including its birth of certain parents, in wedlock, and legitimately, and that the presumption applying in such cases helps him as to the last point; [5] on the supposition, I say, that in any given case the burden of establishing is thus fixed, and that the presumption

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[1] Powers *v.* Russell, 13 Pick. 69, 77 (1832).

[2] As in 142 Mass. p. 360; but this, even under the existing practice in Massachusetts, is not quite true, for after the answer there need be no replication; while anything is open to the plaintiff at this stage. By the St. 1836, c. 273, special pleas in bar in Massachusetts were abolished in all civil actions, and the general issue substituted. This had been the law as to certain sorts of action before. Of the condition of the law as it stood after this change Mr. B. R. Curtis, afterwards Mr. Justice Curtis, said (Report of Commissioners on the Massachusetts Practice Act, Hall, p. 139): "He who now surveys what remains sees every plaintiff left to inhabit the old building, while all others are turned out of doors." The "Practice Act" of 1851, prepared by these Commissioners, abolished the general issue in all but real and mixed actions and substituted a stricter system. But this strictness was in part done away the next year, when the first Practice Act was repealed, and a new one enacted. Under this one, now in force, no pleadings are required after the defendant's answer (compare St. 1851, c. 233, s. 28, with St. 1852, c. 312, s. 19), and the old looseness still exists from this point on.

[3] Abrath *v.* The N. E. Ry. Co., 11 Q. B. D. p. 451.

[4] Sutton *v.* Sadler, 3 C. B. N. S. 87.

[5] Such a case may easily be constructed out of Gardner *v.* Gardner, 2 App. Cas. 723.

thus operates as touching a part only of the total proposition, how does this affect the duty of the *actor*? Of course it does not touch the burden as regards the whole issue, which covers not only the presumed thing, but more. Does it then transfer to the other the duty of establishing a part of the issue? If so, we may easily suppose a variety of presumptions, which would split up the issue in a manner very confusing to a jury or even a judge. What happens in such a case seems rather to be what the Romans called a *levamen probationis*, *i.e.*, the presumption has done the office, as regards a particular fact, of prima facie proof, so that the *actor* need not in the first instance go forward as to this matter; his case is proved by this, without evidence, just as it would have been by such an amount of evidence as makes a prima facie case. Of course his case may not be finally proved thus, for he must meet the defendant's counter proof, and must make good his total proposition not merely at the beginning but at the end of the trial.

Such is the import of the case of Sutton *v.* Sadler,[1] where, in an action of ejectment by an heir-at-law against a devisee, the court held it a misdirection to instruct the jury that the heir-at-law was entitled to recover unless the will was proved; but when the execution of the will was proved the law presumed sanity, and, therefore, the burden of proof shifted and the devisee must pre-

[1] 3 C. B. N. S. 87, and so Symes *v.* Green, 1 Sw. & Tr. 401. So Baxter *v.* Abbott, 7 Gray, 71 (1856), where a decision on an appeal from a degree of a court of probate allowing a will, sustained the ruling (p. 74) that "the burden of proof was on the appellee to show to their [the jury's] reasonable satisfaction that the testator was of sound mind when he executed the instrument in question; that the legal presumption, in the absence of evidence to the contrary, was in favor of the testator's sanity, and that the appellee was entitled to the benefit of this presumption, in sustaining the burden of proof which the law put upon him." "We all agree [p. 83] that it ['the legal presumption'] does not change the burden of proof, and that this always rests upon those seeking the probate of the will." And so Brotherton *v.* The People, 75 N. Y. 159 (1878, Church, C. J.), and People *v.* Garbutt, 17 Mich. 9 (1868, Cooley, C. J.); Dacey *v.* The People, 116 Ill. 555; and a great number of criminal cases in this country holding the like; to the effect that the burden of establishing sanity in an indictment for murder is upon the government, that the presumption of sanity puts upon the defendant the burden of going forward with evidence upon this question, but does not affect the duty of ultimately sustaining sanity,— a fact, which, upon the theory of these cases, is none the less a part of the government's case because it is impliedly and not in terms alleged. This doctrine was adopted in Massachusetts as regards the defence of idiocy, an original absence of natural capacity, in Com. *v.* Heath, 11 Gray, 303 (1858), and by Chief Justice Gray and Morton, J., as to insanity in general, in Com. *v.* Pomeroy (Wharton, Homicide, (2d ed.), Appendix, 753, 754, 756); and it is understood to be now the law in that State.

vail unless the heir-at-law established the incompetency of the testator, and, if the evidence made it a measuring cast and left them in doubt, they ought to find for the defendant. The court held, on the contrary, that while the presumption of sanity freed the defendant from the need of proof in the first instance, it did not relieve him of the fixed, unshifting burden of making out his case of a valid will. In this case there is much talk about whether the presumption of sanity be a presumption of law or of fact. Is not this an idle discussion? There is no rule of legal reasoning which is more commonly called a presumption of law than this, which, prima facie, attributes sanity to human beings. That it is a rule of presumption and a legal rule there is no doubt. The important question in any particular instance is what is the effect and operation of the rule, not what its name is. And in Sutton *v.* Sadler the result is that where the case is an affirmative one, the effect of this legal rule of presumption, on a part of the *actor's* case, is that of making out a prima facie case on this part, and not that of shifting or otherwise affecting the burden of establishing this part of the case.

It is true then that "presumptions shift the burden of proof," in the sense of the duty or going forward with evidence. And in this sense they relieve at the outset, as touching the thing presumed, him who has the duty of establishing; they are always *levamen probationis*. It is also true that rules of presumption *may* fix the duty of establishing, because they are rules of law; and a rule of law which determines who has the affirmative case *may* be cast in the form of a presumption; this is a very common form of expressing all sorts of rules of law. But it is not the nature of rules of presumption, simply as such, to determine the duty of establishing the thing presumed, while it is their nature to fix the duty of meeting the presumption, *i.e.*, of coming forward with argument or evidence. When, therefore, if ever, a rule of presumption does fix the duty of establishing, it is because of what may be called an outside reason, *e. g.*, the existence of a statute or a rule of the substantive law which imparts to the presumption this quality of determining the affirmative side; or, to speak exactly, it is the statute or the substantive law that determines it, and not the rule of presumption.[1] It must be firmly held in mind that rules

[1] To illustrate what is meant by this, let me refer to a passage in Professor Langdell's powerful and remarkable book on Equity Pleading (2 ed.), ss. 117 and 118. In actions

of presumption are adopted for a variety of reasons; that they are not fixed merely with reference to litigation and procedure, but are a part of the machinery for the general administration of justice. They are propositions which, for any purpose, fix the legal equivalence of one set of facts with another. The need of them comes up very often in considering whether a given fact, as death, or life, or title, has been sufficiently proved, but often, also, in determining merely what the substantive law of property or persons may be.[1] The validity, then, of this proposition that a presumption of law fixes the burden of proof (in the sense of establishing), depends on the question whether in any given instances it fixes the affirmative or the negative character of a case for purposes of procedure; and since that question has to be first determined, there seems to be no need of introducing the notion of presumption at all.

IV. As regards a proper terminology for the conceptions now indicated by the "burden of proof." It seems impossible to approve a continuation of the present state of things, under which ideas of great practical importance, and of very frequent application, are so imperfectly and dubiously intimated. What can be done? Of courses that are theoretically possible there are three; to abandon the use of this phrase and choose other terms, or to

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to recover property, he says, the foundation of them is the plaintiff's present ownership; it will not, therefore, be enough to allege that he or his ancestor once had a good title unless on proof of that "the law will raise a presumption that the plaintiff owns the *res* now," or, as it is again put, "that he continues to own it until his death;" but there is such a presumption; had the right of alienation been coeval with the right of property, this would probably have been otherwise; but under the feudal system, as regards land, there was no such right of alienation. "When alienation came to be allowed, the presumption, of course, ceased to be conclusive, but it remained until rebutted; and, as there has been nothing to destroy it, it doubtless continues to exist to this day," etc., etc.

The conception here appears to be that the former rule of real property was a conclusive "presumption of law," that the statute made it a rebuttable presumption of law, and that this presumption of law fixes the "burden of proof" and so determines who holds the affirmative case (see s. 108). But why bring in the term or the notion of "presumption"? Does it not all come down to this that a former rule of the substantive law has been changed by statute, and that he who would avail himself of the statute novelty must set up and prove the matter that entitles him to it, — according to the principle of the rule (Stephen, Pleading (Tyler's ed.), 295, note *y*) that "regulations introduced by statute do not alter the forms of pleading at common law." The rule, in this instance, which determines the affirmative case, seems to have nothing to do with any notion of presuming the continuance of a state of things which is notoriously obsolete, and the "presumption" appears to be a mere form of expression.

[1] On this subject the writer begs to refer to an article on "Presumptions and the Law of Evidence" in 3 Harv. Law Rev. 141.

fix upon it one of the two meanings now in use, and find another phrase for the other. In favor of the first course, there are the obvious reasons of clearness and precision. But it would be a mere dream to imagine that the phrase could ever be wholly banished from legal usage. We might as reasonably expect to exclude it from the common speech of men. Use it we must.

It remains only to choose in what sense it shall be used. Or shall we say here also, that it is hopeless to make a change? No doubt it is difficult, but it cannot be hopeless. A change is simply necessary to accurate legal speech and sound legal reasoning; and we may justly expect that those who have exact thoughts, and wish to express them with precision, will avail themselves of some discrimination in terminology which will secure their end. Particular courts, or judges, or writers, may adopt the course of discarding this phrase altogether and substituting other terms; that is an intelligible plan. But if any one prefers to follow the course which seems certain to be taken by the current of legal usage, that of retaining the phrase in some sense or other, he will be driven, if he would speak accurately, to tie up the term to a single meaning. Which then shall it be, that of going forward with proof, or that of establishing a given proposition in the upshot?

(*a.*) In favor of the former there seem to be these considerations: (1.) It is the meaning that the term has in common speech. Whoever, men say, asserts a paradoxical proposition, has the burden of proof. But equally, they say, whoever supports his paradoxical proposition by sufficient evidence to make it probable, shifts the burden of proof, and now his adversary has it upon him[1]. (2.) This is also a common legal usage.[1] (3.) It is a very comprehensive sense, for it includes not merely the duty of meeting a prima facie case against you, but also that of meeting a presumption, and that of going forward at the beginning. This last may be fixed upon the plaintiff by a mere rule of practice, as in Massachusetts,[2] irrespective of his true place in the procedure; or by the same considerations which determine whether a case is affirmative or negative; but, however fixed, the duty itself is in its nature merely the duty of going forward with the argument or the evidence, a duty wholly separable from that of finally establishing.

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[1] See *ante*, p. 49.

[2] Dorr *v.* Bank, 128 Mass, p. 358; Page *v.* Osgood, 2 Gray, 260.

(*b.*) In favor of the other meaning it may be said (1) that it is the one which is prominent in the Roman law and in countries which have the Roman system of pleading; and (2) that for this exclusive sense there is a certain body of legal authority, *e. g.*, that it has been formerly adopted as the only proper usage by one of our best courts, the Supreme Court of Massachusetts, and, in particular opinions, has been approved by other tribunals and judges.[1] But (1) as to its use in the Roman system, although it would be desirable to harmonize our use of the term *onus probandi* with theirs, that cannot well take place so long as our conceptions, our methods of legal procedure, and the questions which enter into our legal discussions are so unlike theirs.[2] It may be observed also that the immediate intuitus of the phrase, as used in that system, was rather to the duty, at the beginning, of going forward with evidence, than to the duty at the end, of holding the case made out; these two things, as I have said, are quite separable. According to the Roman conception he who had furnished evidence at the outset had furnished *probatio.* If counter evidence were offered, he must, indeed, keep up his *probatio;* but the notion of *probare* and *probatio* was answered by a prima facie case. (2) As regards the fact, that there is high authority for fixing upon the phrase the single meaning of a burden of establishing, it may be doubted whether experience favors a continuance of this experiment. Chief Justice Shaw began it in 1832,[3] and not, as I venture to think, with a sufficient recognition of the fact that the other use of the phrase was also perfectly well fixed in legal usage. During the following twenty-eight years of his most valuable judicial life, he was able to hold the terminology of his court with fair success to the new rule, and to establish it in that State. But the example of this strictness has not, I believe, been followed. The discrimination thus boldly marked has been recognized often in other courts, and this meaning allowed and even preferred, or suggested as the only proper one, in particular opinions; but, so far as I know, no other court has undertaken to distinctly and steadily reject the other meaning.

Let me illustrate the difficulties that have attended the Massachusetts experiment. In 1840[4] Chief Justice Shaw restates his view, and calls the other use of the word "a common misapprehension of

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[1] See *ante*, p. 50.

[2] See *ante*, pp. 46, 55.

[3] Powers *v.* Russell, 13 Pick. 69, 76.

[4] Sperry *v.* Wilcox, 1 Met. 267.

the law on the subject." But in 1842[1] the opinion of the court distinctly lays down the other doctrine: "The [auditor's] report being made evidence by the statute, it necessarily shifted the burden of proof; for being *prima facie* evidence, it becomes conclusive where it is not contradicted or controlled." In 1844 (Taunton Iron Co. *v.* Richmond, 8 Met. 434) the reporter, afterwards Mr. Justice Metcalf, gives a decision of the court (Shaw, C. J.) that an auditor's report is prima facie evidence for the party in whose favor it is made, and adds in his head-note the expression, "and changes the burden of proof." In 1848[2] the court (Metcalf, J.) state that, in a suit by the payee of a promissory note against the maker, "the burden of proof is on the maker" to establish want of consideration. But two years later,[3] they say that the burden of proof is on the plaintiff, and remark (Fletcher, J.) of the previous case that "there is a sentence in this opinion which may be misunderstood; . . . [quoting it]. This must be understood to mean that the burden of proof is on the maker to rebut the *prima facie* case made by producing the note, otherwise the *prima facie* evidence will be conclusive." In this same year, 1850,[4] the court (Metcalf, J.), while distinguishing, in the case of an alteration in a writing, between "the burden of proof" and the "burden of explanation," define the burden of proof in terms borrowed from Baron Parke, but not understood by him or in English legal usage to be limited to the duty of establishing:[5] "The effect . . . would be that if no evidence is given by a party claiming under such an instrument, the issue must always be found against him; this being the meaning of the 'burden of proof.' 1 Curteis, 640." In 1858[6] the court (Dewey, J.) remark upon the fact that the Chief Justice of the lower court had used the phrase in another than "the more precisely accurate use of the term . . . as now held by the court," but they conclude that it did not mislead the jury. In 1859[7] the judge below ruled

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[1] Jones *v.* Stevens, 5 Met. 373, 378, Hubbard, J.

[2] Jennison *v.* Stafford, 1 Cush. 168.

[3] Delano *v.* Bartlett, 6 Cush. 364, 368. It may well be doubted whether this case rests upon the true analysis of the substantive law; but it is still followed in Massachusetts, *e. g.*, in Perley *v.* Perley, 144 Mass. 104 (1887), and, to some extent, elsewhere.

[4] Wilde *v.* Armsby, 6 Cush. 314, 319.

[5] See *ante*, p. 53.

[6] Noxon *v.* DeWolf, 10 Gray, 343, 348.

[7] Morgan *v.* Morse, 13 Gray, 150.

that "the burden of proof was upon the defendant to . . . control the auditor's report," and the court (Bigelow, J.) is obliged again to set forth the discrimination between "the technical sense" of the burden of proof and the other; and then follows what looks like a confession that their exclusive use of the word had not gained any firm hold in the seven and twenty years since Judge Shaw had begun it. "This mode of using the phrase, though somewhat loose and inaccurate, *is quite common*, and where not improperly applied to a case, so as to confuse or mislead the jury, cannot be held to be a misdirection." [1]

Considering, therefore, that the widest legal usage, both in England and here, applies the term "burden of proof" in a sense which is satisfied by making out a prima facie case; that this sense covers the greater variety of situations, viz., not merely the case of one who has a prima facie case, or a presumption against him, but also that of him upon whom rests the duty of going forward with evidence at the beginning; and that it corresponds with the use of the phrase in ordinary discourse, — it would seem wise to fix upon it this meaning only, and to employ for the duty of making out a given proposition, some term, like that, already widely used, of the burden of establishing; in other words, to adopt the meaning which is so carefully stated by the Lord Justice Bowen in Abrath *v.* North-Eastern Railway Co. [2]

V. Whereabout in the law shall we place the subject of the burden of proof? It is common in our system to treat of it, when treated at all, in books on evidence; and the result is that it is little discussed, for it does not belong there. [3] It belongs, as the law of evidence does, to the auxiliary, secondary, "adjective" part of the law; but it is by no means limited to the situation

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[1] The opinion goes on: "In this sense it was manifestly used in this case. The attention of the court was not called to the distinction between that evidence which was sufficient to impeach and overcome a *prima facie* case, and that which was necessary to sustain the issue on the part of the plaintiff. . . . It would have been more correct for the court to have instructed the jury that the report of the auditor in favor of the plaintiff was *prima facie* evidence, and sufficient to entitle him to a verdict, unless it was impeached and controlled by the evidence offered by the defendant. But we see no reason to believe that the instruction given was not properly understood, or that the defendant was in any way aggrieved thereby." See also the difficult exposition in Wilder *v.* Cowles, 100 Mass. 487 (1868).

[2] See *ante*, p. 49.

[3] Bentham, Works, vi. 214. "This topic [the *onus probandi*] . . . seems to belong rather to Procedure than to Evidence."

where parties are putting in "evidence"; it applies equally where the "evidence" is all in. It covers the topic of argument, of legal reasoning; and equally of reasoning about law and about fact; while the law of evidence relates merely to matter of fact offered to a judicial tribunal as the basis of inference to another matter of fact. To undertake to crowd within the limits proper to the law of evidence the considerations necessary for the determination of matters of a far wider scope, like those questions of logic and general experience and substantive law involved in the subjects of Presumption and Judicial Notice,[1] and that compound of considerations of the same character, coupled with others relating to the history and technicalities of pleading and mere forensic procedure, which lie at the bottom of what is called by this name of the "Burden of Proof," — to attempt this is to burst the sides of the smaller subject and to bring obscurity over the whole of it. And, moreover, it is to condemn this topic, so important in the daily conduct of legal affairs, and so much needing a clear exposition, to a continuance of that neglect, and that slight and merely incidental treatment which it has so long suffered.

*James B. Thayer.*

CAMBRIDGE, May, 1890.

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## ELEVATED ROAD LITIGATION.

THE case of Story *v.* N. Y. Elevated R. R. Co., 90 N. Y. 122, presented to the court of last resort in the State of New York a problem in the decision of which was involved a larger amount of property rights than ever came before an American tribunal, unless, perhaps, in the telephone cases. And the case also teemed with as many interesting, important, and varied legal questions as any one case could present. It was *sui generis* and novel in the matters in controversy. It was twice argued by the flower of the New York bar. It considered and laid down what are the rights in the highways that abutters on public streets possess. It determined what is and what is not a legitimate and

[1] 3 Harv. Law Rev. 141; ib. 285.